In the Supreme Court of the United States

OCTOBER TERM, 1940.

No. .....

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
A Corporation,
Petitioner,

v.

ELMER RICHARDSON,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

OPINIONS OF THE COURTS BELOW.

The opinion of the Circuit Court of Appeals is reported at 116 Fed. (2d) 860. It is also included in the printed record filed herewith. (R. 67-72.)

The District Judge filed a memorandum with his orders overruling the motion for new trial and the motion for judgment notwithstanding the verdict. (R. 11, 12.) This memorandum is not reported.

No other opinions were rendered by either court.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

These grounds have been set forth in the petition (*supra*, p. 6) and in the interest of brevity are not repeated here.

STATEMENT OF THE CASE.

The case has been stated in the petition (*supra*, pp. 1-6) as fully as neeessary for this brief, and in the interest of brevity the statement is not repeated.

ERRORS INTENDED TO BE URGED.

(1) The Circuit Court of Appeals erred in holding that Richardson's own act, in turning to face the cutting operation, was not the sole proximate cause of his injury.

(2) The Circuit Court of Appeals erred in holding that Richardson did not assume the risk of the injury which he suffered.

(3) The Circuit Court of Appeals erred in holding that the trial court's charge was not erroneous.

(4) The Circuit Court of Appeals erred in holding that plaintiff's counsel was not guilty of misconduct preventing defendant from having a fair trial.

ARGUMENT.

I.

RICHARDSON'S OWN ACT, IN TURNING TO FACE THE CUTTING OPERATION, WAS THE SOLE PROXIMATE CAUSE OF HIS INJURY.

A. The Evidence Shows no Negligence on the Part of the Railway.

The sole ground of negligence submitted to the jury was "in failing to hold up the cutting operation until he had had a reasonable opportunity of getting into the clear so as to avoid the risk of injury from flying chips." (R. 48, 49.) Richardson's own undisputed testimony was that at the time the cutting operation started, he was walking away from its scene, and had gone about 18 or 20 feet. (R. 18, 19.) If there was any negligence, it must have been in the cutting crew's starting to work at a time when Richardson was 18 to 20 feet away, with his back turned.

The evidence supports no other conclusion than that the only substantial danger from flying chips was that of injury to the eyes. The men immediately engaged in cutting were furnished goggles and required to wear them, but they wore no protection for other parts of the body

than the eyes, and no special clothing (R. 38, 39), although they had to work within the length of a sledge-handle of the source of the chips. Richardson himself, in his nine years of employment on a track gang, including participation in the work of cutting rails, had never known of anyone being injured by flying chips. (R. 21, 22.) His division engineer testified that minor injuries did occur, but very seldom. (R. 39.) His foreman testified that the chips flew "like pellets out of a gun," but he actually saw the chip as it hit Richardson. (R. 15.)

The cutting crew had been instructed,—on the evidence most favorable to plaintiff,—not to begin cutting until the other men "got in the clear." (R. 44, 45.) It was the alleged violation of this instruction on which the plaintiff relied, and which the trial court submitted to the jury, as the sole item of negligence. We submit that Richardson obviously was "in the clear" when the cutting started. With his back turned, his eyes were in no possible danger, and no injury to any other part of his body was, or could reasonably have been, anticipated. One of the cutting crew saw him just as the cutting started, 18 or 20 feet away and with his back turned, and considered that he was in the clear (R. 29, 30); and no other reasonable conclusion can be drawn from his distance and position.

B. Richardson's Turning to Face the Cutting Operation was such Negligence as to Defeat Recovery under the Rule of Great Northern Railway v. Wiles, 240 U. S. 444.

Under the provisions of the Federal Employers' Liability Act (U. S. Code, Title 45, Sec. 53) contributory negligence of the injured employee is not a bar to recovery, but operates to diminish the amount of damages recoverable in proportion to the amount of negligence attributable to the employee. However, this Court and several of the Circuit Courts of Appeals, including the Sixth, have held that where the employee's conduct is without extenuation

or amounts to violation of a rule or a specific instruction, it defeats recovery under the Act. An early decision of this Court exemplifying this rule is that in the case of

Great Northern Ry. Co. v. Wiles, 244 U. S. 444, 36 S. Ct. 406, 60 L. Ed. 732 (1916)

in which the brakeman of a freight train was killed while in the caboose after the train had been stopped by the pulling out of a draw bar. A rule of the railroad made it his duty to go back and warn following trains in case of such a stop. The decedent failed to do so and a following passenger train collided with the rear end of the freight. This Court reversed a judgment rendered in favor of Wiles' Administrator.

The Circuit Court of Appeals of the Second Circuit applied the same rule in the case of

Vanderveer v. D. L. & W. R. R. Co., 84 F. (2) 979 (1936)

in which a freight conductor was killed in a wreck resulting from his having, in violation of rule, changed certain switches which were lined up for the movement of another train. The Circuit Court of Appeals affirmed a judgment which the trial court had entered on a directed verdict in favor of the railroad.

The Circuit Court of Appeals for the Sixth Circuit formerly recognized the rule, as shown in the case of

Hylton v. Southern Ry. Co., 87 F. (2) 393 (1937)

in which are cited numerous decisions from the Sixth and other circuits, resting on the doctrine that

> "an employee may not recover under the Federal Employers' Liability Act (45 U. S. C. A. §§ 51-59) if he disobeys 'specific orders or standing rules promulgated for his own safety * * *. In such circumstances the employee's disobedience is regarded as primary negligence * * * as 'the sole proximate cause of the injury.' " (87 F. (2) p. 395.)

Richardson's conduct, as disclosed by the undisputed evidence, comes fully within the rule of these cases. Not only had the crew been instructed to give him the opportunity to get into the clear, but Richardson himself had been instructed to do so. His turning was plainly a violation of his instructions.

It does not alter the situation to argue that Richardson would probably have been safe in facing the cutting operation at a distance of 30 to 40 feet, but was not given time to reach that distance. He was perfectly safe in the position he had already reached, safe not only from the injury he subsequently suffered, but also from any other injury reasonably to be expected.

The Circuit Court of Appeals excused Richardson's turning on the theory that it was an act "done under the stimulus of sudden peril or in the case of an emergency requiring immediate decision." (R. 70.) The difficulty with this theory is that it has no basis in the record. If Richardson had in fact turned suddenly or without reflection, there would be room to claim, at least, that he did so as a reaction to a suddenly discovered danger. But his own testimony is that he heard several blows of the sledges, and figured it was the crew he had been helping, before he turned. (R. 23.) As to the "stimulus of sudden peril," the sound of a cutting operation which Richardson, in his nine years of employment, had never known to injure anybody, could hardly be very stimulating as a sudden peril or any other kind of peril, to a man with his back turned.

II.

RICHARDSON ASSUMED THE RISK OF THE INJURY HE SUSTAINED.

The Circuit Court of Appeals, undertaking to distinguish between assumption of risk and contributory negligence, said (R. 68):

> "Assumed risk refers to a general course of action in connection with the employer's way of doing busi-

> ness or the use of appliances furnished by him. Contributory negligence refers to the question as to whether the employee acted prudently in connection with matters that arose for his consideration during the course of his employment and under circumstances not contemplated by him as part of the employment. Assumption of risk rests upon the intelligent acquiescence and knowledge of the danger and appreciation of the risk naturally incident to the employment of or arising from a particular situation in which the work is done."

We submit that under the decisions of this Court, assumption of risk is not confined to general courses of action in connection with methods of doing business or using appliances, but extends also to the risk of single instances of negligence by the employee's fellow servants. We submit further that assumption of risk rests not only on intelligent acquiescence and knowledge of danger and appreciation of the risk, but that it may also be based on the existence of risks so obvious that an ordinarily prudent person would have observed them.

The Circuit Court of Appeals' definition of assumption of risk, which is fairly summarized in the passage above quoted, is directly in conflict in these two respects, with numerous decisions of this Court, and had the lower court applied the proper definition to the present record, it would have had to find, as a matter of law, that Richardson assumed the risk of the injury he sustained.

With respect to the scope of risks assumed, this Court in the case of

> *Seaboard Air Line Railway v. Horton*, 233 U. S. 492, 34 S. Ct. 635, 58 L. Ed. 1062 (1914)

noted the existence of two sorts of risks, one necessarily arising from the nature of the employment, and the other, overlooked by the Circuit Court of Appeals in the present case—the risks arising from negligence attributable to the employer. In the *S. A. L. v. Horton* case this Court held

that an engineer assumed the risk of operating a locomotive turned over to him without a guard for the water gauge, and reversed a judgment recovered by Horton in the trial court. Mr. Justice Pitney said (233 U. S., at p. 504):

> "Some employments are necessarily fraught with danger to the workman—danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employe is not treated as assuming until he becomes aware of the defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them."

In other cases this Court has observed that the assumed risk of negligence extends to the negligence of fellow-servants.

Thus, in the case of

C. & O. Ry. Co. v. Nixon, 271 U. S. 218, 46 S. Ct. 495, 70 L. Ed. 914 (1926)

this Court denied recovery for the death of a section foreman whose duty was to inspect the track, and who was killed while riding to his work on a railway velocipede which he used in track inspections. The jury found that the engineer and fireman of the train which killed the foreman were negligent in not being on the lookout. Mr. Justice Holmes said, in the opinion of the Court (271 U. S. at p. 219):

> "If the accident had happened an hour later when the deceased was inspecting the track, we think that there is no doubt that he would be held to have assumed

> the risk, and to have understood, as he instructed his men, that he must rely upon his own watchfulness and keep out of the way. The Railroad Company was entitled to expect that self-protection from its employees."

It seems to us that the language of Mr. Justice Holmes can be applied with particular fitness to Richardson in the present case.

Certainly, if any degree of self-protection was reasonably to be expected of any employes at the scene of Richardson's injury, Richardson himself could fairly be expected not to turn and expose his eyes to the flying chips. Certainly, in the words of Mr. Justice Holmes, "the railroad company was entitled to expect that self-protection from its employees."

It seems plain that had the Circuit Court of Appeals not eliminated from the scope of assumed risk the negligence of Richardson's fellow-employees, that Court would have had to hold, as a matter of law, that Richardson did assume the risk of injury so as to bar his recovery. We believe, as we have argued above, that the evidence does not show any negligence on the part of the cutting crew, but allowing Richardson all he can claim on this point, his recovery must still have been defeated had the lower court followed the law of *C. & O. Ry. Co. v. Nixon.*

The Court of Appeals' definition of assumption of risk was erroneous also in asserting that it

> "rests upon the intelligent acquiescence and knowledge of the danger and appreciation of the risk * * *."

This Court has on numerous occasions held that the assumed risks include not only those of which the employee has actual knowledge and to which he intelligently acquiesces, but also those risks which are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them. Thus in the case of

> *C. & O. Ry. Co. v. DeAtley,* 241 U. S. 310, 36 S. Ct. 564, 60 L. Ed. 1016 (1916)

this Court reversed a judgment recovered by a brakeman who was injured while attempting to board a moving train, on the theory that he could not recover if the undue speed of the train was so obvious that an ordinarily careful person in his situation would observe the speed and appreciate the danger. A paragraph from the opinion of the Court, delivered by Mr. Justice Pitney, summarizes the application of the rule in that case (241 U. S., at p. 314):

> "On the facts of the case before us, therefore, plaintiff having voluntarily entered into an employment that required him on proper occasion to board a moving train, he assumed the risk of injury normally incident to that operation, other than such as might arise from the failure of the locomotive engineer to operate the train with due care to maintain a moderate rate of speed in order to enable plaintiff to board it without undue peril to himself. But plaintiff had the right to presume that the engineer would exercise reasonable care for his safety, and cannot be held to have assumed the risk attributable to the operation of the train at an unusually high and dangerous rate of speed, until made aware of the danger, unless the speed and the consequent danger were so obvious that an ordinarily careful person in his situation would have observed the one and appreciated the other." (Citing cases.)

Considering the present case in the light most favorable to Richardson, it seems to us that it is squarely within the rule of the *DeAtley* case. Richardson, let us admit, had the right to presume that the cutting would not be commenced and the chips would not begin to fly until he had reached a distance of 30 feet or 40 feet, or whatever other number of feet anyone could regard as a safe distance. Let us also admit that the cutting crew was negligent in beginning their work when he was only 8 to 20 feet away. Let us also admit that there was substantial danger of injury to other parts of Richardson's body than his eyes, at a distance of 18 to 20 feet. With all of these admissions made, whether justifiably or not, the fact remains that the danger to the eyes, in facing the operation without goggles, was

so obvious that no ordinarily careful person in Richardson's situation could have failed to observe and appreciate it.

DeAtley, as this Court said, assumed the risk of boarding trains moving at slow speeds, but not the risk of the engineer negligently operating the train too fast to be safely boarded, unless the danger arising therefrom was obvious to the specified degree. Richardson presumably assumed certain risks of his employment, but not the risk of the cutting crew starting too soon, *unless the danger therefrom was obvious to a similar degree.* It was this last clause that the Circuit Court of Appeals missed. That court held that Richardson would not in any event assume the risk of the cutting crew starting too soon. But the present record supports no other possible conclusion that the danger to the eyes from facing the work was so obvious and well known that no reasonable person could have failed to recognize it. Richardson's turning to face it was precisely analogous to DeAtley's attempting to board the moving train, with this exception: The speed of the train in DeAtley's case was such that this Court thought reasonable men might differ as to the obviousness of the danger therefrom, while in the present case, no reasonable difference of opinion could exist as to the danger of facing the cutting operation with unguarded eyes.

III.

OTHER ERRORS INTENDED TO BE URGED.

Included in the questions presented on the present record are the questions whether the trial court's charge was erroneous, and whether plaintiff's counsel was guilty of misconduct preventing a fair trial. We believe that these questions are substantial and ought to be considered by this Court if certiorari is granted, and we have included them in the petition for that reason. However, we do not claim that they present reasons for allowance of the writ of certiorari, and therefore they are not argued in this brief.

CONCLUSION.

The decision of the Circuit Court of Appeals in this case, if allowed to stand, will lead to confusion in the law applicable to Federal Employees' Liability Act cases in two respects in which it has heretofore been well and clearly settled,—namely, on the propositions, first, that an employee's negligence, where it is not extenuated or is in violation of a rule or specific instruction, defeats his recovery under the act, and second, that the employee assumes the risk of negligence of his fellow-servants not only where the danger therefrom is actually observed and appreciated, but also where it is so obvious that a reasonably careful person could not fail to observe and appreciate it. The points at which the lower court departed from the established law are quite easily observable on this record, as we have pointed out.

We submit that the writ of certiorari ought to be granted, and the law of the Sixth Circuit restored to conformity.

Respectfully submitted,

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Counsel for Petitioner.